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October 9, 2012

Ex Parte Filing

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Room TW-A325
Washington, D.C. 20554

Re: CC Docket 95-116; WC Docket 07-149; WC 09-109

Dear Ms. Dortch:

On October 4, 2012, Scott Deutchman, Richard Fruchterman, and Aaron Goldberger of Neustar, Inc., Kevin Dwyer of Jenner & Block, and I met with Diane Griffin Holland, Maureen Duignan, Neil Dellar, and (for a portion of the meeting) Marcus Maher of the Office of General Counsel, and Ann Stevens of the Wireline Competition Bureau ("Bureau"). The subject of our presentation was the RFP process for the selection of the Local Number Portability Administrator ("LNPA") at the conclusion of Neustar's current contract.

Neustar expressed its support for the RFP Documents[1] and explained that significant changes to the process proposed by the Future of NPAC Subcommittee ("FoNPAC") and the North American Numbering Council ("NANC") – pursuant to the Bureau's May 2011 Order – would threaten delay and invite litigation. The Commission staff asked questions about the process proposed by the FoNPAC and the NANC with respect to the evaluation of neutrality, the Commission's authority to review bidders' compliance with the Commission's neutrality requirements, and whether it would be appropriate to conduct a neutrality review in a parallel

[1] The RFP documents include a Vendor Qualification Survey, a Technical Requirements Document, and a Request for Proposal. Hereinafter, these documents will collectively be referred to as the "RFP Documents."

process separate from evaluation of the bids' technical merits. Neustar's responses to these questions are included in the discussion below.

Neustar also explained why mandating either regional or nationwide bids would be inappropriate. From Neustar's point of view, there are obvious and significant advantages to a nationwide LNPA, and it should be free to put forward its best bid based on that judgment. That does not foreclose any bidder from submitting regional or nationwide bids (or both) based on its own assessment of what it can best provide; nor does it preclude the FoNPAC from seeking additional bid structures as part of the best-and-final-offer process. Neustar also explained that it was appropriate to require bidders to satisfy neutrality requirements with respect to any sub-contractor playing a substantive role in provision of LNPA services and noted that the FoNPAC is well situated to make line-drawing judgments.

1. The Commission should reject Ericsson's request to override the process proposed by the FoNPAC and the NANC by splitting consideration of bidder neutrality off from the "technical" evaluation of bids, with the Commission evaluating neutrality in a parallel process. That approach would be unworkable as a practical matter, would threaten to introduce significant inequity into the bidding process, and would change the previously approved process without legitimate procedural or substantive justification. In particular, Ericsson's proposal confuses the Commission's role in enforcing its own neutrality requirements and the role of the industry and the NANC in defining *their* requirements for potential bidders. Taking the approach that Ericsson has proposed – despite uniform support for the existing process by all segments of the industry, state regulators, and consumers, simply to accommodate the demands of a single bidder – would be arbitrary and unlawful.

First, the suggestion that neutrality review can be isolated from consideration of other aspects of bids is mistaken, because neutrality issues are inter-related with technical and cost issues. For example, a Primary Vendor might propose a bid that includes work by sub-contractors that are non-neutral; evaluating whether such a bid satisfies neutrality would require an understanding of the technical role of the sub-contractor and the ways in which such a sub-contractor could influence provision of the service. To cite another example, to the extent a bidder argues that there are technical or operational measures that enable it to satisfy the "undue influence" element of the three-part neutrality test, such a claim can be best evaluated by those with appropriate technical or operational expertise. Splitting off the neutrality review will prevent evaluation of neutrality issues in the appropriate context.[2]

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[2] The process outlined in the RFP Documents anticipates an initial up-or-down decision on neutrality; that initial judgment likewise might not be able to take all these considerations into account and neutrality issues may, therefore, arise later in the process. In that event, we would expect the FoNPAC to work with a bidder to address any such neutrality issues and, if they could not be addressed, disqualify a bid that did not satisfy the neutrality criteria in the RFP documents. A parallel Commission process would not offer that flexibility.

Second, vendors need to know how neutrality will apply before they can bid. The possibility that the Commission would apply neutrality rules in a manner inconsistent with the understanding reflected in the RFP Documents – for example, by loosening the definition of "undue influence" to permit a particular bidder to serve as LNPA – creates the prospect of a process in which the rules are not clear in advance and in which bidders will be unable to reflect the actual costs of neutrality in their bids. The costs of neutrality – especially in terms of forgone business opportunities but also in administrative and compliance burdens – must be factored into any legitimate bid.

While the issues currently before the Commission are a matter of process, it is important to keep front and center that these decisions may ultimately have real impacts on the system to be procured. LNP administration is a complex system that is instrumental in ensuring successful local number portability, the delivery of every voice call and text message, and the provision of critical services such as Telephone Number management and the restoration of service in the event of a disaster. It is accordingly a critical part of the telecommunications infrastructure in the United States. Even a relatively small failure of LNP administration, which works extremely well today, would have a significant financial impact on carriers and damage consumer confidence in a system that is a linchpin for telecommunications competition.

For these reasons, among others, there are very stringent neutrality rules in place that all bidders must meet. If neutrality under the new NPAC contract is going to mean something significantly different from what it has meant over the last 15 years, that must be made clear at the outset.

Third, there is no legitimate justification for the Commission to interfere with the process laid out by the FoNPAC and the NANC simply to accommodate the demands of a single bidder. The NPAC contract is an industry contract that fulfills the obligation that rests on *carriers* to provide "number portability in accordance with requirements prescribed by the Commission." 47 U.S.C. § 251(b)(2). The industry pays for NPAC services and relies on the LNPA to provide service in a manner that fulfills its needs. The Commission has prescribed regulations that apply to the provision of NPAC services. The North American Portability Management LLC ("NAPM") and the NANC, in recommending an entity to serve as LNPA under the next contract, must show that the recommendation fulfills any applicable regulatory requirements. But as long as those regulatory requirements are satisfied, nothing in the Commission rules justifies interference with the industry's choices about which service designs and which vendor best satisfy the industry's requirements.

With respect to neutrality in particular, the FoNPAC and the NANC have both the correct incentives and the institutional expertise to make the appropriate judgments about the strength of a vendor's neutrality showing. The FoNPAC represents the industry's interests in ensuring complete confidence that the LNPA will perform its functions in a strictly impartial manner.

Such confidence is critical, not only because the LNPA is privy to competitively sensitive information, but also because, as the NPAC accommodates rapid innovation in the direction of all-IP networks, the industry must be able to trust the LNPA to innovate in a manner that will not favor any particular service provider or industry segment. Because the industry is in the best position to understand precisely the NPAC's role in the provision of service and the risk of harm from any bias, it is in the best position to make the right judgment about a particular vendor's neutrality showing.

The Commission, of course, has the authority to rule that a particular vendor does not satisfy the requirements of the Commission's rules notwithstanding the contrary recommendation of the NANC. But the Commission does not have any legitimate basis to bar the industry from choosing to enforce neutrality requirements that either meet or are potentially more stringent than the Commission itself might choose to require in the context of its own numbering administration contracts. The Commission's decision to adopt the NANC's initial recommendation of Lockheed Martin and Perot Systems as neutral administrators reflects the appropriate Commission role. The Commission held that "the criteria utilized by the NANC in reviewing and evaluating the selection process employed by the various service providers at the regional level were sufficient to ensure that the local number portability database administrators ultimately recommended meet the Commission's requirements,"[3] and, on that basis, the Commission approved the selection. The Commission's review was thus limited to ensuring that the criteria and selection process were designed to ensure that the Commission's requirements were met; it did not second-guess the industry and NANC's evaluation of the strength of competing bids.

The Commission's deliberations concerning the Lockheed-Martin divestiture and the creation of Neustar illustrate the distinction between the Commission's role with respect to a government contract and its role with respect to the NPAC contract. Ericsson has argued that those proceedings demonstrate that the Commission has exercised flexibility with respect to neutrality requirements, but that argument ignores the fact that the Commission's deliberations in that regard ***did not relate to the NPAC contract at all.*** Those deliberations were expressly limited to the neutrality of the ***NANPA*** – which *is* a government contract.[4] The Commission left it to the NAPM to address neutrality concerns under the NPAC contract.

Ericsson suggests that the industry will fail to preserve appropriate competitive pressure throughout the bidding process. The argument misconceives both the basis for and function of

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[3] Second Report and Order, *Telephone Number Portability*, 12 FCC Rcd 12281, 12303, ¶ 33 (1997).

[4] *See* Order, *Request of Lockheed Martin Corp. and Warburg, Pincus & Co. for Review of the Transfer of the Lockheed Martin Communications Industry Services Business*, 14 FCC Rcd 19792, 19792, ¶ 1 ("We conclude that Lockheed must obtain our prior approval before transferring the NANPA functions.").

the neutrality requirements in the bidding process. Those requirements are not designed to prevent competitive bidding, but to ensure that the LNPA will satisfy the industry's requirements with respect to confidentiality, even-handedness, and future innovation in NPAC services. They originate from the statute and the Commission's rules; their application in the current environment reflects experience gained over 15 years of NPAC administration. There is no basis for the Commission to interfere with that considered industry judgment or to prevent the industry from obtaining the service it believes it needs.

Just as important, the industry has every incentive to ensure that competitive pressure is maintained throughout the bidding process; it will be. No bidder will know what the competitive landscape looks like as the process moves forward, and, given the competitiveness of the industry and the prospect of multiple competitive bids, bidders will necessarily be under pressure to offer the best possible value. Moreover, the FoNPAC has every interest in keeping it that way: the industry bears the costs of number portability, and the members of the NAPM bear the vast bulk of that cost. Ericsson's claim that the industry would deliberately inflate the cost of NPAC services defies logic and is unsupported by any evidence.

If the Commission were to put its thumb on the scale now to advantage a particular potential bidder it would be rejecting its own previously ordered selection process as well as the critical roles of the industry and the NANC and the neutrality rules as they have been applied over the last 15 years. Neustar continues to provide exemplary value to its customers and, by extension, consumers. Neustar looks forward to demonstrating that in detail in its proposal. There is no reason for the Commission to divert from the fair and transparent process that has been set out.

2. For the foregoing reasons, the judgment about whether the LNPA is sufficiently neutral to satisfy the demands of the industry is a judgment that the industry should make, subject to Commission review for satisfaction of the Commission's rules. But if the Commission decides that evaluation of bidder neutrality is a matter for the Commission in the first instance, the lawful way to conduct that evaluation is pursuant to an open and transparent procedure, with appropriate notice to interested parties and an opportunity to provide comments, in which the neutrality of each potential bidder would be addressed in advance. Such an open process is required because if the Commission decides that certain types of "corporate reorganization" or other neutrality mitigation actions can address neutrality concerns, all bidders should have the same opportunity to employ such approaches. Otherwise, there will be no level playing field. Moreover, the evaluation of individual bidders' showing of neutrality has the potential to affect the interests of other bidders, the industry, and consumers.

What the Commission cannot do is conduct a secret proceeding in which neutrality requirements will be the subject of individualized negotiation. Such negotiations may occur

when the government is procuring services for itself.[5] But when, as here, the government interprets and enforces its own rules, it must comply with the requirements of the Administrative Procedure Act and its own rules. An elaborate pre-RFP proceeding would be unnecessary if the Commission allowed the procedure proposed in the RFP Documents to go forward, consistent with the May 2011 Bureau Order. But if the Commission heeds Ericsson's request to evaluate neutrality in the first instance, the Commission cannot lawfully act without affording all potential bidders fair and open procedures.

All parties appear to agree that the neutrality requirements set out in the RFP Documents are critical to the LNPA's role; it should be in no one's interest to see the RFP process unnecessarily delayed. Any modification to the process proposed in the RFP Documents should promote those interests. The alternative to the RFP process that Ericsson has proposed would involve the Commission prematurely – and, we submit, unnecessarily – and thus would not serve the shared interest in a prompt and fair evaluation of competing bids.

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If you have any questions concerning this matter, please contact me at (202) 326-7921.

Sincerely,

Aaron M. Panner
Counsel for Neustar, Inc.

cc: Diane Griffin Holland
Maureen Duignan
Neil Dellar
Marcus Maher
Ann Stevens

[5] *See* 48 C.F.R. § 15.306(d). Even with respect to the NANPA government contract, previous questions of the vendor's neutrality have been addressed through NANC recommendations followed by Commission notice-and-comment proceedings.